

No. 126, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

Before The Honorable William J. Kayatta, Jr.
Special Master

SUBPOENA TO PRODUCE DOCUMENTS

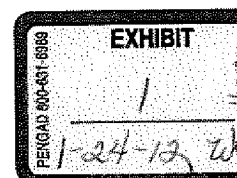
September 1, 2011

TO:

**United States Bureau of
Reclamation**
c/o: Mr. Aaron M. Thompson,
Area Manager
203 West 2nd Street
Grand Island, NE 68801

United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
(By certified mail)

Pursuant to the Case Management Plan in the above-captioned matter ("CMP") and Fed. R. Civ. P. 45, as incorporated by the CMP, you are hereby **ORDERED** to produce and make available the documents specified in the letter attached hereto as Exhibit A.



As specified in Section 6.1.3 of the CMP, a copy of which is attached hereto as Exhibit B, you have thirty (30) days from the date of service of this Subpoena to serve objections and begin producing documents, and sixty (60) days, for full production. If you anticipate that full production will require more than sixty (60) days, you must notify the Special Master within twenty (20) days of service of this Subpoena and a telephone conference will be convened to discuss the issue.

The provisions of Rule 45(c) and (d) of the Federal Rules of Civil Procedure are set forth, as required by Rule 45(a)(1)(A)(iv) of the Federal Rules of Civil Procedure, in Exhibit C, attached hereto.

This Subpoena is issued pursuant to Fed. R. Civ. P. 45(a)(3)(B) by counsel for the States of Kansas and Nebraska.

INSTRUCTIONS

In responding to this Subpoena, you are required to furnish all information and documents that are available to you or subject to your reasonable inquiry including information in the possession of your attorneys, representatives, and anyone else otherwise subject to your control.

In responding to this Subpoena, you must make a diligent search of your records and of other papers and materials in your possession or available to you or your representatives, including electronically stored information.

DEFINITIONS

Unless otherwise indicated, the following definitions shall be applicable to these requests for production:

A. The words "Document" and "Documents" mean all written, electronic, recorded, or graphic matters, however produced or reproduced,

whether or not privileged, pertaining in any way to the subject matter of this action. This definition includes, but is not limited to, any and all originals, copies, or drafts of any and all of the following: records; notes; summaries; schedules; contracts or agreements; drawings; sketches; invoices, orders or acknowledgements; diaries, reports, forecasts or appraisals; memoranda of telephone or in person conversations by or with any person, or any other memoranda; letters, telegrams, telexes, or cables prepared, drafted, received or sent; tapes, transcripts, or recordings; photographs, pictures or films; computer programs or data or other graphic, symbolic, recorded or written materials of any nature whatsoever. Any document which contains any comment, notation, addition, insertion or marking of any kind which is not part of another document or any document which does not contain any comment, notation, addition, insertion, or marking of any kind which is part of another document, is to be considered a separate document.

STATE OF KANSAS

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Attorney General of Kansas



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(505) 986-2525

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Post Office Box 98920
Lincoln, Nebraska 68509-8920
(402) 471-2682

cc w/ encl: James J. DuBois, U.S. Department of Justice
John Chaffin, U.S. Department of Interior



**MONTGOMERY
& ANDREWS**

JOHN B. DRAPER

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Reply To: Santa Fe Office

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September 1, 2011

Aaron M. Thompson
Area Manager
U.S. Bureau of Reclamation
203 West 2nd Street
Grand Island, NE 68801

**Re: Touhy Request and Subpoena for Documents and Information in
Kansas v. Nebraska & Colorado, No. 126, Orig., U.S. Supreme Court**

Dear Mr. Thompson:

The States of Kansas, Nebraska and Colorado respectfully request that you provide the testimony, documents and information specified in Appendices A and B hereto for use in the above-referenced litigation. A copy of the Petition (i.e., Complaint) filed by Kansas, along with a copy of Nebraska's Answer and Counterclaims are attached hereto as Exhibit 1 pursuant to 43 C.F.R. §2.84(b). A copy of the current Case Management Plan governing this proceeding is attached to the accompanying Subpoena to Produce Documents as Exhibit B to the Subpoena.

The appropriate State will submit a check for costs to the Department of Interior (Department), in accordance with 43 CFR § 2.85, if its request is granted. In addition, the appropriate State will pay the costs of duplication in accordance with 43 CFR part 2, appendix A, if its request is granted.

The requested testimony, documents and information are expected to be relevant and useful in resolving disputes among the States as those disputes are presently framed in the litigation. In summary, these concern: (a) Nebraska's alleged non-compliance with the 2003 Decree entered in the above referenced litigation, as well

Exhibit A to Subpoena

REPLY TO:

325 Paseo de Peralta
Santa Fe, New Mexico 87501
Telephone (505) 982-3873 • Fax (505) 982-4289

Post Office Box 2307
Santa Fe, New Mexico 87504-2307

6301 Indian School Road NE, Suite 400
Albuquerque, New Mexico 87110
Telephone (505) 884-4200 • Fax (505) 888-8929

Post Office Box 36210
Albuquerque, New Mexico 87176-6210

Aaron M. Thompson
September 1, 2011
Page 2

as the underlying Republican River Compact; (b) Kansas' concerns that Nebraska will be unable to comply with these obligations in the future, and (c) certain changes to the Republican River Compact Administration's Accounting Procedures as proposed by the State of Nebraska.

The parties to the litigation include the three States. The U.S. Bureau of Reclamation (Reclamation) maintains projects in all three States. The United States appeared as *amicus curiae* in the proceeding in the original jurisdiction of the United States Supreme Court, and, with input from Reclamation, was a full participant in the negotiations that resulted in the 2003 Decree. The United States is presently participating as *amicus curiae* in the litigation. The outcome of the pending litigation is likely to impact directly, or indirectly, Reclamation's customers in the Republican River Basin.

The information requested is not reasonably available from any other source. Reclamation possesses unique information on the matters at issue in this proceeding, including the history of Reclamation's projects and facilities in the Republican River Basin. There is no record or set of records that can conveniently be provided and used in lieu of the testimony, documents, and information requested.

The States believe this request complies with 43 CFR § 2.88 because: (a) the information is not available from another source as explained above; (b) the information, to our knowledge, would not be inconsistent with any other federal statute or regulation; and (c) providing the information would be consistent with the Department's ability to:

- (1) Conduct its official business unimpeded: This request has been tailored to minimize as much as possible any interference with your schedule and official obligations;
- (2) Maintain impartiality in conducting the Department's business: The information requested is information about Reclamation's policies applicable to its Projects in the Basin for the benefit of water users in the Basin;
- (3) Minimize the possibility that the Department will become involved in issues that are not related to its mission or programs: The outcome of the pending litigation is likely to affect, directly or indirectly, Reclamation's customers;
- (4) Avoid spending public employee's time for private purposes: Providing the information will facilitate resolution of ongoing interstate conflicts concerning a Supreme Court decree and an interstate compact;

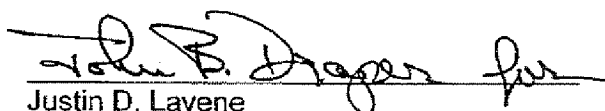
Aaron M. Thompson
September 1, 2011
Page 3

- (5) Avoid the negative cumulative effect of granting similar requests: Given the unique character of the present interstate proceeding, it is not expected that there will be many similar requests that would have an unwanted cumulative negative effect on the Department;
- (6) Insure that privileged or protected matters remain confidential: No privileged or protected information is requested; and
- (7) Avoid undue burden on the Department: This request has been tailored to minimize any impact on the Department.

Thank you very much for your consideration of this request.

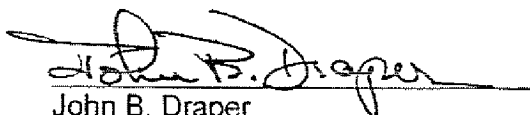
Sincerely yours,

For the State of Nebraska



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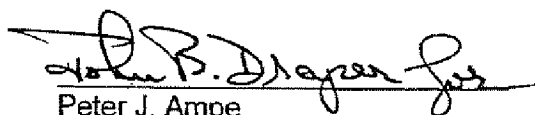
For the State of Kansas



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Aaron M. Thompson
September 1, 2011
Page 4

For the State of Colorado

A handwritten signature in black ink, appearing to read "Peter J. Ampe", written over a horizontal line.

Peter J. Ampe
Counsel of Record
First Assistant Attorney General
Autumn L. Bernhardt
Assistant Attorney General
Federal & Interstate Water Unit
Natural Resources & Environment Section
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Denver, CO 80203
peter.ampe@state.co.us
autumn.bernhardt@state.co.us

Aaron M. Thompson
September 1, 2011
Page 5

Appendix A

Please provide the following to the State of Nebraska (through counsel at the address indicated above):

1. The testimony of Mr. Aaron Thompson, Area Manager. In accordance with 43 C.F.R. 2.84(e), Nebraska submits that Mr. Thompson's testimony is required because Mr. Thompson has unique and personal knowledge of events leading to Reclamation's critique of Nebraska's Integrated Management Plans, including the scope of analyses conducted to support that critique. In addition, Nebraska expects Mr. Thompson will be able to provide:
 - a. An explanation of how record adjustments are made after Nebraska Bostwick Irrigation District and Kansas Bostwick Irrigation District submit irrigation information to Reclamation.
 - b. An explanation of how Reclamation verifies the amount of water actually delivered to producers.
 - c. An explanation of the process by which Reclamation uses actual gaged flows to derive the diversion numbers for the Courtland Canal reported in Table 2 of Reclamation's Annual Operating Plan, including a discussion of how canal losses enter into these calculations.

No record can be provided and used in lieu of Mr. Thompson's testimony.

2. The following documents¹ and information:
 - d. All analyses, including supporting data and related documentation, conducted or reviewed by Reclamation to formulate testimony Reclamation has offered since 2004 concerning Nebraska's Integrated Management Plans.
 - e. All correspondence between or among Reclamation and one or more of the States concerning matters raised in the pending litigation.
 - f. Documents showing crop type acreage and yields by canal service area within the Republican River Basin from 1995 through 2010.
 - g. Copies of logs maintained by ditch riders within the Republican River Basin from 1995 through 2010.

¹ The term "documents" as used in this letter, is defined in the accompanying Subpoena to Produce Documents.

Aaron M. Thompson
September 1, 2011
Page 6

- h. Conveyance loss or other efficiency studies conducted in the Republican River Basin.
 - i. Grant applications related to irrigation within Reclamation service areas in the Republican River Basin.
 - j. Documents evidencing the location and description of conveyance, delivery, and application infrastructure transmitting water resources under Reclamation management within the Republican River Basin
 - k. Improvements made to conveyance, delivery, and application infrastructure transmitting water resources under Reclamation management within the Republican River Basin since 2003
 - l. Studies evaluating return flows from or within Reclamation projects within the Republican River Basin
 - m. Reports of cost share funds used to improve irrigation infrastructure within the Republican River Basin (e.g., Water Smart grants)
 - n. Historical diversions of storage water by canal service area within the Republican River Basin
 - o. Historical diversions of natural flow by canal service area within the Republican River Basin
 - p. Historical deliveries to producers by canal service areas within the Republican River Basin
 - q. Agreements to sell additional water for irrigation to producers served by Reclamation resources within the Republican River Basin
 - r. All historical Monthly Water Distribution Tables, including electronic spreadsheets, for all Reclamation-contracting irrigation districts within the Republican River Basin including both the final versions prepared by Reclamation and the preliminary versions provided by the irrigation districts with related correspondence.
 - s. The cost structure Reclamation uses to price irrigation water.
3. All data and supporting information used to determine if water short administration is in effect, including completed determinations for of the years 2003 – 2010.

Aaron M. Thompson
September 1, 2011
Page 7

Appendix B

Please provide the following to the State of Kansas (through counsel at the address indicated above):

1. All updates to the documents and information provided in response to Kansas' previous Touhy request letter, dated January 29, 2009, a copy of which is attached as Exhibit 2 to the 9/1/11 Touhy letter.